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No. 89-312

In the Supreme Court of the United States

OCTOBER TERM, 1989

SYRACUSE PEACE COUNCIL, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT L. PETTIT
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

C. GREY PASH, JR.
Counsel
Federal Communications Commission
Washington, D.C. 20544

QUESTION PRESENTED

Whether the Communications Act of 1934, 47 U.S.C. 301 *et seq.*, requires the Federal Communications Commission to retain the "fairness doctrine" notwithstanding the Commission's determination that the doctrine no longer serves the public interest.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-72a) is reported at 867 F.2d 654. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 188a-281a) is reported at 2 F.C.C. Rcd 5043. The memorandum opinion and order of the Federal Communications Commission on reconsideration (Pet. App. 282a-306a) is reported at 3 F.C.C. Rcd 2035.

JURISDICTION

The judgment of the court of appeals (Pet. App. 73a-74a) was entered on February 10, 1989. The orders of the court of appeals denying rehearing and rehearing *en*

banc were entered on April 25, 1989 (Pet. App. 75a, 76a). By order dated May 15, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 23, 1989. The petition for a writ of certiorari was filed on August 23, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1949, in its *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949), the FCC set forth obligations that were thereafter known as the "fairness doctrine."[1] The fairness doctrine imposed a two-fold obligation on broadcasters. Each licensee of a radio or television broadcast station was required (1) to provide coverage of vitally important controversial issues of interest in the community served by the licensee, and (2) to afford a reasonable opportunity for the presentation of contrasting viewpoints on any controversial issue of public importance covered by the licensee. See *Fairness Report*, 48 F.C.C.2d 1 (1974), reconsid. denied, 58 F.C.C.2d 691 (1976), aff'd in part and remanded in part, *NCCB* v. *FCC*, 567 F.2d 1095 (D.C. Cir. 1977), cert. denied, 436 U.S. 926 (1978). Failure to abide by these requirements could subject a licensee to sanctions ranging from an order requiring

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[1] The Commission's efforts to ensure that broadcasters were "fair" in their coverage of controversial public issues can be traced to its early decisions and those of its predecessor, the Federal Radio Commission. See, *e.g.*, *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32 (1929), rev'd on other grounds, *Great Lakes Broadcasting Co.* v. *FRC*, 37 F.2d 993 (D.C. Cir.), cert. dismissed, 281 U.S. 706 (1930); *Chicago Fed. of Labor*, 3 F.R.C. Ann. Rep. 36 (1929), aff'd, *Chicago Fed. of Labor* v. *FRC*, 41 F.2d 422 (D.C. Cir. 1930); *Young People's Ass'n for the Propagation of the Gospel*, 6 F.C.C. 178 (1938).

the licensee to remedy its programming deficiencies to an order denying renewal of its license.[2]

In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), this Court upheld the constitutionality of the fairness doctrine. Relying on the FCC's representation that it had no evidence that the doctrine chilled speech, the Court concluded that the doctrine would enhance, rather than abridge, First Amendment goals. The Court added, however, that if experience with the administration of the doctrine "indicates that [it has] the net effect of reducing rather than enhancing the volume and quality of coverage," the doctrine's "constitutional implications" would be subject to reconsideration. *Id.* at 393. Such a reduction in speech would be a "serious matter," the Court stressed, since "the purposes of the doctrine would be stifled." *Ibid.*[3]

2. In 1984, the FCC began a comprehensive reexamination of the public policy and constitutional implications of the fairness doctrine. See *Notice of Inquiry*, 49 Fed. Reg. 20,317. Based on the "voluminous factual record" compiled in that inquiry (which included more than 100 written comments and two days of hearings before the Commission), along with the Commission's

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[2] See, *e.g.*, *Patsy Mink*, 59 F.C.C.2d 987 (1976); *Public Media Center*, 59 F.C.C.2d 494 (1976); *Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18 (1970), aff'd on other grounds, *Brandywine-Main Line Radio, Inc.* v. *FCC*, 473 F.2d 16 (D.C. Cir. 1972), cert. denied, 412 U.S. 922 (1973).

[3] The Court reiterated the point more recently, stating that "were it to be shown by the Commission that the fairness doctrine '[has] the net effect of reducing rather than enhancing' speech, we would then be forced to reconsider the constitutional basis of our decision in [*Red Lion*]." *FCC* v. *League of Women Voters*, 468 U.S. 364, 378-379 n.12 (1984) (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 393 (1969)).

own "experience in administering the doctrine" over many years and its "general expertise in broadcast regulation," the Commission concluded that the doctrine no longer serves the public interest in access to diverse sources of information. *In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 147 (1985) [hereinafter *1985 Fairness Report*] (Pet. App. 77a, 81a). The Commission also questioned whether the doctrine remained consistent with the First Amendment as it had been applied in *Red Lion*. *Id.* at 82a-93a.

Although the Commission "questioned the permissibility of the [fairness] doctrine as a matter of both policy and constitutional law" in the *1985 Fairness Report*, it decided not to eliminate or modify the doctrine in that proceeding. Pet. App. 180a-181a. The Commission noted that the fairness doctrine had been "a longstanding administrative policy," that "Congress [had] shown a strong although often ambivalent interest" in it, and that this Court's decision in *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), "demonstrated an interest in [the Commission's] examination of the constitutional and policy implications underlying the fairness doctrine." *1985 Fairness Report*, Pet. App. 181a. In view of "intense Congressional interest in the fairness doctrine and the pendency of legislative proposals," the Commission determined that it would be inappropriate at that time to eliminate the fairness doctrine or to act on various proposals to modify or restrict it. *Ibid.*[4]

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[4] The Commission noted that a number of comments had addressed the question whether the Commission had authority to eliminate or substantially modify the fairness doctrine. Pet. App. 161a. It found that Congress had not "explicitly codified the fairness doctrine prior

3. In the meantime, in 1984, acting on a complaint filed by petitioner Syracuse Peace Council, the Commission concluded that television station WTVH in Syracuse, New York, licensed to Meredith Corporation, had violated the fairness doctrine. The Commission found that the station had aired a series of editorial advertisements that described the construction of a nuclear generating plant as a "sound investment" for New York, without adequately presenting contrasting viewpoints. *Syracuse Peace Council*, 99 F.C.C.2d 1389, 1395-1401 (1985).

In a motion for reconsideration, Meredith claimed that the fairness doctrine is unconstitutional. Adhering to the course it had adopted in the *1985 Fairness Report*, the Commission declined to consider Meredith's constitutional challenge. The Commission explained that it viewed Congress and the courts as "more appropriate venues for reacting to the constitutional question." *Syracuse Peace Council*, 59 Radio Reg.2d (P&F) 179, 182 (1985).

On review, the court of appeals upheld the Commission's determination that the station had not satisfied the requirements of the fairness doctrine. *Meredith Corp.* v. *FCC*, 809 F.2d 863 (D.C. Cir. 1987). However, noting that the *1985 Fairness Report* had cast "grave legal doubt on the fairness doctrine," the court of appeals held that the Commission was obligated to consider Meredith's constitutional challenge—unless the

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to the 1959 Amendments to the Communications Act" and that the doctrine did not "necessarily inhere[ ] in the public interest standard of the Communications Act." *Ibid.* The Commission characterized the question whether the 1959 amendments codified the doctrine as a "more difficult" one, but found that it need not reach the question in view of its decision to await further congressional consideration of the matter. *Ibid.*; see *id.* at 82a, 180a. To facilitate further congressional consideration, the Commission set forth at length the arguments on both sides of the issue. *Id.* at 161a-180a.

Commission determined that "in light of its Fairness Report it may not or should not enforce the [fairness] doctrine because it is contrary to the public interest." 809 F.2d at 873, 874. The court also noted that, in *Telecommunications Research & Action Center* v. *FCC*, 801 F.2d 501, reh'g denied, 806 F.2d 1115 (D.C. Cir. 1986) (en banc), cert. denied, 482 U.S. 919 (1987) [hereinafter *TRAC*], it had held that the fairness doctrine was not "mandated by statute"; thus, the court observed, that ground for resolving the case no longer remained available to the Commission. 809 F.2d at 873 n.11. See note 4, *supra*.

4. a. Upon remand, the Commission again requested comments from the public "on whether, in light of the *1985 Fairness Report*, enforcement of the fairness doctrine is constitutional and whether enforcement of the doctrine is contrary to the public interest." *Syracuse Peace Council*, 2 F.C.C. Rcd 794 (1987). An additional 50 comments were received from a variety of interests. Pet. App. 201a. In August 1987, the Commission issued its decision. *Id.* at 188a-281a. The Commission concluded—based upon the administrative record, the *1985 Fairness Report*, the Commission's experience in administering the fairness doctrine, its knowledge of the communications area, and fundamental constitutional principles—that "the fairness doctrine, on its face, violates the First Amendment and contravenes the public interest." Pet. App. 190a.

The Commission noted that in its *1985 Fairness Report* it had "evaluated the efficacy of the fairness doctrine in achieving its regulatory objective." Pet. App. 231a. The Commission reiterated the conclusons it had reached in that report on the basis of "compelling evidence"—that the operation of the doctrine "thwarts the purpose that it is designed to promote" and that "[i]nstead of enhancing the discussion of controversial issues of public importance," "the fairness doctrine, in operation, 'chills' speech." *Ibid.*

The Commission explained that the fairness doctrine "provides broadcasters with a powerful incentive not to air controversial issue programming above that minimal amount required by the first part of the doctrine." Pet. App. 231a. It noted that the *1985 Fairness Report* had documented 60 instances in which the fairness doctrine inhibited broadcasters' coverage of controversial issues, and that self-censorship was not limited to individual programs, but extended to policies under which stations refused to present editorials, to accept political advertisements, or to air nationally produced programming discussing controversial issues. *Id.* at 233a-235a; see *id.* at 103a-122a. The Commission reaffirmed its finding in the *Fairness Report* "that those specific instances of broadcasters' conduct were broadly illustrative of a prevalent reaction to the doctrine and that the record from the inquiry overwhelmingly demonstrated that broadcasters act upon those incentives and limit the amount of controversial issue programming presented on the airwaves." *Id.* at 233a-234a. The Commission also noted that enforcement actions, such as this proceeding, provide substantial disincentives to broadcasters. *Id.* at 235a.

The Commission found that isolated statements that individual broadcasters were not inhibited by the fairness doctrine did not "demonstrate generally an absence of a 'chilling effect' in the broadcasting industry." Pet. App. 237a. The Commission continued (*ibid.*):

> No broadcaster indicated to us that its coverage of controversial issues has increased as a result of the fairness doctrine, and absent such evidence to offset the numerous instances of chill that we have identified, we can only conclude that the *overall* net effect of the doctrine is to reduce the coverage of controversial issues of public importance, in contravention of the standard announced in *Red Lion*.

The Commission turned next to the question whether the fairness doctrine was narrowly tailored to serve a substantial government interest. The Commission noted that although it had once taken the position that it had an obligation to oversee programming to ensure the availability of diverse viewpoints to the public, the *1985 Fairness Report* had "repudiated the notion that it was proper for a governmental agency to intervene actively in the marketplace of ideas." Pet. App. 238a. The Commission reiterated the report's finding that the fairness doctrine "represents an intrusion into a broadcaster's editorial discretion, both in its enforcement and in the threat of enforcement." *Id.* at 239a.

The Commission also determined that the doctrine is no longer necessary to ensure the availability to the public of diverse viewpoints and information. The Commission relied on the finding of the *1985 Fairness Report* that there had been an "explosive growth in both the number and types" of information outlets since the *Red Lion* decision (Pet. App. 241a; see *id.* at 130a-155a), and noted that the advent and increased availability of other technologies such as cable and satellite television services had further enhanced the public's access to media outlets (*id.* at 242a). The Commission reaffirmed the conclusion of its *1985 Fairness Report* that "the fairness doctrine is not necessary in any market to ensure that the public has access to diverse viewpoints from today's media outlets." *Id.* at 244a-245a.

Taking all of these determinations into account, the Commission concluded (Pet. App. 247a):

> In sum, the fairness doctrine in operation disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. Its chilling effect thwarts its intended purpose, and it

> results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists. We hold, therefore, that under the constitutional standard established by Red Lion and its progeny, the fairness doctrine contravenes the First Amendment and its enforcement is no longer in the public interest.

The Commission vacated its earlier order and dismissed the complaint against Meredith. *Id.* at 278-279a.[5]

b. In a subsequent decision, the Commission denied petitions for reconsideration. Pet. App. 282a-306a. The Commission rejected the contention that the fairness doctrine had been codified in a 1959 amendment to Section 315 of the Communications Act, 47 U.S.C. 315, or that it was inherent in the Act's general public interest standard. The Commission explained that it was bound by the D.C. Circuit's holding in *TRAC* that Section 315 of the Act did not codify the fairness doctrine, and it added that since the doctrine is unconstitutional, the doctrine's elimination is, "*a fortiori*, consistent with, not violative of, [the Commission's] public interest mandate." Pet. App. 290a-292a & n.33.

The Commission also rejected the argument that it was required to consider and adopt alternative means of enforcing the doctrine, rather than eliminating it altogether. In a separate proceeding, the Commission noted, it had concluded that while there were alternatives that were somewhat preferable to the then current method of enforcing the doctrine, the alternative that "best achieves

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[5] The Commission opinion explored at some length a "preferred constitutional approach" that it believed should apply in the present context. Pet. App. 247a-277a. In view of the court of appeals' disposition of the case on non-constitutional grounds, it is unnecessary to address that aspect of the decision.

the First Amendment principles underlying the doctrine, and consequently, [the Commission's] public interest objectives, would be an unregulated marketplace of ideas." Pet. App. 295a.[6]

Finally, the Commission determined that it had not erred in eliminating the first prong of the doctrine, under which broadcasters were obligated to address vitally important controversial issues. The Commission explained that it did not consider the two prongs of the doctrine severable and that, even if they were, the Commission "would not choose, as a policy matter, to enforce such a revised first prong divorced from the second prong." Pet. App. 301a. "Having eliminated the chilling effects most directly associated with the second prong of the doctrine," the Commission continued, "coverage of controversial

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[6] In 1986, Congress directed the Commission to conduct an inquiry to "consider alternative means of administration and enforcement of the Fairness Doctrine and to report to the Congress by September 30, 1987." Act of Oct. 18, 1986, Pub. L. No. 99-500, 100 Stat. 1783-67; see also H.R. Rep. No. 1005, 99th Cong., 2d Sess. (1986). In a comprehensive report adopted in August 1987, the Commission examined numerous alternatives to abandonment of the fairness doctrine and concluded that none eliminated the doctrine's chilling effect and its tendency to promote governmental intrusion into the editorial judgments of broadcasters. *In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees,* 2 F.C.C. Rcd 5272 (1987), reconsid. denied, 3 F.C.C. Rcd 2050 (1988). Accordingly, the Commission determined that only elimination of the fairness doctrine "is most likely to achieve the purpose of the fairness doctrine—namely, 'to preserve an uninhibited marketplace of ideas in which truth will undoubtedly prevail.' " 2 F.C.C. Rcd at 5276 (quoting *Red Lion,* 395 U.S. at 390). The Commission also concluded that its analysis of alternatives to the fairness doctrine "strengthen[ed] [its] belief that the fairness doctrine disserves the public interest and contravenes fundamental principles of free speech." 2 F.C.C. Rcd at 5295.

issues will be forthcoming naturally, without the need for continued enforcement of the first prong." *Id.* at 303a.

5. The court of appeals affirmed. Pet. App. 1a-72a. All three members of the panel filed opinions. All three upheld the Commission's findings that the obligation to provide contrasting views chills speech and that the availability of new media outlets and technology makes that obligation unnecessary to ensure that the public has access to diverse viewpoints. *Id.* at 13a-22a, 65a-70a. However, different majorities furnished the court's holdings with respect to that aspect of the fairness doctrine and the obligation to provide coverage of controversial issues.[7]

a. With respect to the second prong of the doctrine—the requirement that a broadcaster air conflicting views—Chief Judge Wald joined in portions of Judge Williams' opinion. Together, they held that the Commission's conclusion that that prong of the fairness doctrine does not serve the public interest was supported by the record; that conclusion, they also determined, provides a sufficient non-constitutional basis for the Commission's decision to eliminate the obligation to provide contrasting views. Judge Williams and Chief Judge Wald explained that the "Commission's factual judgments here are almost entirely predictive—statements about the overall effects of a policy on licensee and others." Pet. App. 14a. In such circumstances, they continued, "we owe great deference to the Commission's judgment." *Id.* at 13a. In a separate opinion, Judge Starr also affirmed the Commission's findings that the fairness doctrine reduces coverage of controversial issues and is unnecessary to assure the public's

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[7] All three members of the panel agreed that the *TRAC* decision was binding on the question whether the fairness doctrine is required by statute. Pet. App. 7a, 33a, 50a n.6.

access to divergent views. *Id.* at 62a. However, he concluded that the Commission's determination that the second prong of the fairness doctrine is no longer valid should be reviewed and upheld on constitutional grounds. *Id.* at 42a-72a.

b. Judges Williams and Starr concluded that the Commission's decision not to preserve the first prong of the fairness doctrine—the requirement that broadcast stations provide coverage of vitally important controversial issues in their communities—was not arbitrary and capricious. Pet. App. 27a-32a; *id.* at 70a-72a. Both found the Commission's determination that elimination of the second prong would make the first prong unnecessary to be reasonable, particularly in view of the Commission's findings as to the increasing diversity of outlets and programming. *Ibid.* Chief Judge Wald dissented from that aspect of the decision. *Id.* at 33a-41a.

ARGUMENT

Congress is presently considering legislation that could deprive the questions presented by this case of any future significance. Moreover, even if Congress should choose not to act, and thus to leave the decisions in *TRAC* and this case undisturbed, this case would not call for the Court's review. Given the basis on which the panel upheld the Commission's decision, the only questions properly presented are narrow—whether the Communications Act compels the Commission to apply the fairness doctrine and, if not, whether the Commission's decision to abandon the doctrine was arbitrary and capricious on the administrative record. The two courts of appeals that have addressed the issue have held that the Communications Act does not require the Commission to adhere to the fairness doctrine. That conclusion is well founded, and is en-

tirely consistent with the decisions of this Court, including *Red Lion*. Further review is therefore not warranted.

1. As petitioners note (Pet. 17-18 & nn.24-25, 22 & n.36), Congress has given substantial attention to the fairness doctrine during its last two Sessions. This legislative activity is consistent with the "intense Congressional interest" in the issue that the Commission noted in 1985. Pet. App. 181a. Legislation that would have codified the fairness doctrine as part of the Communications Act was adopted by both the House and Senate in 1987, but was vetoed by the President. See Pet. 18 n.25. Similar legislation has been introduced this year, and has been reported favorably by committees in both Houses.[8] The enactment of this legislation would deprive the question presented by the petition, which involves the construction of the present Act, of any future significance.[9]

2. Even apart from the possibility of congressional action, this case does not call for the Court's review.

a. Petitioners argue that the fairness doctrine was codified in a 1959 amendment to Section 315(a) of the Communications Act, 47 U.S.C. 315(a). However, the only two circuits that have addressed that question directly have concluded that the doctrine is *not* mandated by Sec-

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[8] See H.R. 315, 101st Cong., 1st Sess. (1989); H.R. Rep. No. 153, 101st Cong., 1st Sess. (1989); S. 577, 101st Cong., 1st Sess. (1989); S. Rep. No. 141, 101st Cong., 1st Sess. (1989). The House bill was included as part of the Omnibus Budget Reconciliation Act of 1989, H.R. 3299, 101st Cong., 1st Sess. (1989). It was passed by the House on October 5, 1989. See 135 Cong. Rec. D1135 (daily ed. Oct. 5, 1989).

[9] Should legislation be enacted while the case remains pending, the Commission and the court of appeals should have an opportunity to consider its application to this case and any constitutional questions that it might present. We disagree, therefore, with petitioners' suggestion (Pet. 22 n.37) that the passage of legislation could provide a basis for expedited review in this Court.

tion 315(a). *TRAC,* 801 F.2d at 517-518; *Public Interest Research Group* v. *FCC,* 522 F.2d 1060, 1066-1067 (1st Cir. 1975), cert. denied, 424 U.S. 965 (1976).[10]

As we explained in our brief in opposition to the petition for certiorari in *TRAC,* the Commission has "recognized that there is no easy answer to the question whether Congress has enacted the fairness doctrine as positive law or simply approved the doctrine as a permissible exercise of the Commission's authority to regulate broadcasters in the public interest." Brief for the Federal Respondents in Opposition at 8, in *Telecommunications Research & Action Center* v. *FCC,* No. 86-1371; see Pet. App. 166a-180a. Nevertheless, it remains our view that "the language of the statute and the legislative history, as interpreted by this Court in *Red Lion,* indicate that Congress has not codified the fairness doctrine as positive law." *TRAC* Br. in Opp. at 8-12.

On its face, Section 315(a)'s reference to the fairness doctrine does no more than protect the doctrine from inferences that might otherwise be drawn from the subsec-

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[10] Petitioners argue (Pet. 15) that the D.C. Circuit's interpretation of Section 315(a) of the Communications Act conflicts with the Seventh Circuit's "holding" in *Maier* v. *FCC,* 735 F.2d 220 (1984). However, in *Maier,* the court had no occasion to consider whether the Commission was obligated by statute to apply the fairness doctrine. In the course of considering whether the denial of a fairness doctrine complaint was a reviewable order, the court in *Maier* made a passing reference to this Court's observation in *Red Lion* that Congress " 'has ratified [the fairness doctrine] with positive legislation.' " *Id.* at 225 n.4. This reference adds nothing whatever to *Red Lion.* As we shall explain (pp. 16-17, *infra*), *Red Lion* stands only for the proposition that Section 315(a) recognized the Commission's authority to promulgate the fairness doctrine, and not that the Commission was obligated to do so. There is no conflict between *Maier* and the decision below on the question presented by this case.

tion's preceding sentence.[11] As *TRAC* explained, "The language, by its plain import, neither creates nor imposes any obligation, but seeks to make it clear that the statutory amendment does not affect the fairness doctrine obligation as the Commission had previously applied it." 801 F.2d at 517. The proviso thus does not deprive the Commission of authority it has from other sources to eliminate or modify the fairness doctrine. Indeed, on its face, Section 315(a) refers to the application of the fairness doctrine only "in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events," but not editorial advertising of the type

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[11] Section 315(a) provides (emphasis added):

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
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> (1) bona fide newscast,
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> (2) bona fide news interview,
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> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. *Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*

that triggered this case. That limitation on the proviso confirms that its purpose is only to counteract an earlier sentence that has the same scope; surely Congress could not have intended to codify the fairness doctrine as to some types of broadcasts, but not others.

The legislative history does not justify a departure from the plain meaning of the savings clause. The purpose of the 1959 amendment as a whole was to overturn the Commission's decision in *Lar Daly,* 26 F.C.C. 715 (1959), which held that the equal opportunities requirement of Section 315 was triggered by the appearance of a political candidate on a newscast. As the Commission has observed, "the legislative history lacks clear record evidence demonstrating a reasoned consideration of the fairness doctrine which would indicate an intent by Congress to codify the doctrine. While there are scattered references to the obligations of broadcasters under the public interest standard to present both sides of controversial public issues by some members of Congress, there was no significant discussion of the Commission's fairness doctrine." 1985 Fairness Report, Pet. App. 169a. In view of the broad and flexible authority that Congress had delegated to the Commission to apply the Communications Act's "public interest" standard, we believe that Judge Bork's assessment of the legislative history in *TRAC* was correct: "It would have been extraordinary if Congress in 1959 had intended to strip the Commission of all further discretion in this area and to freeze by statute the fairness doctrine in the form it had in 1959. * * * One would have expected extended congressional discussion of the wisdom of such a move. There is none." 806 F.2d at 1121 (statement of Bork, J., in support of denial of rehearing en banc).

The Court's decision in *Red Lion* does not suggest otherwise. See Pet. 17. In that case, the issue was whether

the Communications Act *authorized*—not obligated—the Commission to promulgate the fairness doctrine. The Court took care to describe the process through which the Commission had developed the doctrine and to identify various statutes from which the Commission had derived its authority. 395 U.S. at 375-380. That discussion is incompatible with the view that the evolution of the fairness doctrine reflected only the Commission's performance of a mandatory statutory duty arising at the time that the Act was passed or when it was amended in 1959.

When the Court turned to the doctrine's recognition in various congressional actions, it said that the fairness doctrine "finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history." 395 U.S. at 380. If Section 315 had made the doctrine mandatory, the Court could have resolved any issue of the Commission's authority without referring to provisions on which the doctrine had been modeled or any other indicator of congressional approval. Similarly, after noting that Section 315(a) had "knowingly preserved" the Commission's efforts in the area of the fairness doctrine, the Court concluded that the doctrine was "a legitimate exercise of congressionally delegated authority" and that the actions subject to review were not "beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves 'the public interest.' " 395 U.S. at 385, 396. That is not language that describes agency compliance with a mandatory statutory duty.

b. Petitioners claim that, even apart from Section 315(a), the general public interest standard of the Communications Act obligates the Commission to retain the

fairness doctrine. See Pet. 10-15. No decision of which we are aware supports that view, and it flies in the face of *Red Lion*'s discussion of the evolution and status of the fairness doctrine. Whatever construction is placed on the 1959 amendment to Section 315(a), it is "quite clear that Congress had not previously enacted the fairness doctrine." *TRAC,* 806 F.2d at 1119 (statement of Bork, J., on denial of rehearing en banc). As *Red Lion* put it, the period prior to the amendment of Section 315 was made up of "[t]hirty years of consistent administrative construction *left undisturbed by Congress,*" 395 U.S. at 382 (emphasis added), not thirty years in which that construction was mandated by Congress.

This Court has repeatedly recognized that Congress granted the FCC broad discretion to determine what "the public interest" requires under evolving conditions in the broadcast industry. See *FCC* v. *WNCN Listeners Guild,* 450 U.S. 582, 593-596 (1981); *Red Lion,* 395 U.S. at 379-380; *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 225 (1943); *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 138 (1940). That flexible standard cannot fairly be construed to require adherence to the fairness doctrine at a point when the Commission determines that it has become counterproductive.

Based upon a voluminous administrative record, its familiarity with the broadcasting industry, and its experience with the fairness doctrine, the Commission has now found that the doctrine "disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression." Pet. App. 247a. The Commission has also found, in view of developments in the broadcasting industry, that the doctrine is "not necessary in any market to ensure that the public has access to diverse viewpoints from today's media outlets." *Id.* at 244a-245a. The

court of appeals has sustained those findings under the appropriate standard of judicial review. The petition does not seriously challenge the court's analysis of the administrative record, and any question regarding the sufficiency of the support in that record for the Commission's findings would not raise an issue of a type warranting this Court's review. At this juncture, therefore, this case does not present a choice between a "public trustee concept" and a "print model" (Pet. 10) for regulation of the broadcast industry. Rather, the issue is whether the "public interest" standard in the statute requires the Commission to apply a doctrine that undercuts its own reason for being.

In their dire predictions regarding the effect of the Commission's decision on the broadcast industry (Pet. 13-15), petitioners greatly overstate the reach of the decision and ignore the express and inherent limits on the Commission's reasoning. By its own terms and as affirmed by the court of appeals, that decision is limited to the fairness doctrine itself, and goes no further than the Commission's determinations regarding that doctrine's effects in the broadcasting industry. The decision does not affect any other aspect of the regulatory scheme.

Thus, the decision does not "invalidate * * * the entire public interest regulatory scheme at renewal." Pet. 15. Existing FCC policies continue to impose substantial public interest responsibilities on broadcast licensees. For example, broadcasters would continue to have the basic obligation, enforceable through denials of license renewals, to provide "issue responsive" programming that meets the needs and interests of their communities.[12] The decision at

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[12] See *Commercial TV Stations*, 98 F.C.C.2d 1076, 1091 (1984), reconsid. denied, 104 F.C.C.2d 358 (1986), aff'd in part and remanded in part on other grounds, *Action for Children's Television* v. *FCC*, 821 F.2d 741 (D.C. Cir. 1987); *Deregulation of Radio*, 84 F.C.C.2d 968,

issue here has no effect on broadcasters' responsibility to provide programming directed to the special needs of children in their community of license,[13] and broadcasters continue to have the statutory obligation to provide candidates with equal opportunities and reasonable access under the Act. 47 U.S.C. 315, 312(a)(7). More generally, broadcasters will continue to have to demonstrate that their operations are in "the public interest" in order to obtain renewal of their licenses. 47 U.S.C. 309. The Commission made very clear that all of these obligations remain in effect after its decision in this case. Pet. App. 218a-219a n.91, 224a n.101, 291a-292a, 304a-305a.

Even as to policies that are closely related to the fairness doctrine, such as the personal attack and political editorial rules, the Commission stated that it would consider separately what effect, if any, its decision would have on those policies.[14] Any decision to modify those rules would

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977-978, reconsid. denied, 87 F.C.C.2d 797 (1981), aff'd in part and remanded in part on other grounds, *Office of Communication of United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983). Contrary to petitioners' assertions (Pet. 12-14), the Commission has emphasized that while a licensee, "in the exercise of its good faith judgment, will be able to address issues by whatever program mix it believes is appropriate in order to be responsive to the needs of its community * * *, [o]f course, broadcasters cannot engage in intentional [racial] discrimination in the selection of issues to be addressed in their programming." *Commercial TV Stations*, 98 F.C.C.2d at 1092 & n.53, citing *LaMar Life Broadcasting Co.*, 38 F.C.C. 1143, 1154-1155 (1965); see also *Deregulation of Radio*, 84 F.C.C.2d at 978.

[13] See *Children's Television Programming*, 96 F.C.C.2d 634, 655-656 (1984), aff'd, *Action for Children's Television* v. *FCC*, 756 F.2d 899 (D.C. Cir. 1985).

[14] Pet. App. 287a-288a. A separate proceeding is now pending with respect to the personal attack and political editorial rules. See *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 48 Fed. Reg. 28,295 (1983).

be subject to judicial review based upon an administrative record permitting full consideration of the Commission's application of the Act's public interest standard to a record compiled for that purpose.

c. In its present posture, this case does not present the question whether *Red Lion*'s constitutional analysis remains good law or whether changes in the broadcasting industry require a different result under that analytical framework. See Pet. 18-21. Only Judge Starr considered the Commission's constitutional determination, and that portion of his opinion did not constitute part of the panel's holding.

d. Finally, petitioners contend (Pet. 21) that the court of appeals committed "clear error" in affirming the Commission's decision to eliminate the first prong of the fairness doctrine. However, at this juncture, the only issue is whether that decision was arbitrary and capricious. See Pet. App. 28a, 41a, 72a. The basis for the Commission's action was its determination that it "would not choose, as a policy matter, to enforce [the] first prong divorced from the second prong," since "enforcement of the first prong alone in this fashion would be largely duplicative of [the Commission's] existing enforcement of the requirement that broadcasters cover issues that are responsive to the needs and interests of their communities, [and] there would be no added public interest benefit to enforcing the first prong of the fairness doctrine as an independent policy." Pet. App. 301a-302a. The Commission also explained that "[h]aving eliminated the chilling effects most directly associated with the second prong of the doctrine, coverage of controversial issues will be forthcoming naturally, without the need for continued enforcement of the first prong." *Id.* at 303a. This Court has repeatedly recognized that judgments of this nature are entitled to "substantial judicial deference." *FCC* v. *WNCN Listeners*

Guild, 450 U.S. at 594-596; *FCC* v. *National Citizens Comm. for Broadcasting,* 436 U.S. 775, 810 (1978). The court of appeals' application of the appropriately deferential standard of review to the administrative record here is not a matter warranting this Court's further review. This is especially so in light of the fact that in the history of the fairness doctrine, there has been only one case in which the Commission has found that a licensee violated the first part of the doctrine. See *Patsy Mink,* 59 F.C.C.2d 987 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**

ROBERT L. PETTIT
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

C. GREY PASH, JR.
Counsel
Federal Communications Commission

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* The Solicitor General is disqualified in this case.

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